No. 12,414

IN THE

United States Court of Appeals

For the Ninth Circuit

PHIL DAVIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF PLEADINGS AND JURISDICTION OF THIS COURT.

This appeal is brought from a judgment of conviction by the District Court for a violation of Section 526m of Title 46, U.S.C.A. The appellant here claims that the trial Court was in error for two reasons: (1) that the District Court had no jurisdiction of the subject matter of the case for the reason that the alleged crime occurred on waters not subject to the jurisdiction of the United States, and (2) for the reason that the trial Court was in error in taking the question of navigability of the lake from the jury and instructing the jury as to such fact as a matter of law.

STATEMENT OF FACTS.

The appellant was convicted of operating a motor boat in a reckless or a negligent manner and thus endangering the life and limb of other persons in the State of California, but on the waters of Lake Tahoe. Appellant here makes no point as to the sufficiency of the evidence establishing reckless operation of the boat and for the purpose of this brief that question will be conceded. The only evidence introduced at the trial relating to the question of jurisdiction was the testimony of F. W. Brenzel contained in the Clerk's Transcript, starting on page 10 and ending on page 17. This evidence simply establishes that Lake Tahoe is approximately twelve hundred feet deep at certain points; that up to six or seven years ago a mail boat made regular runs to various points on the lake both on the Nevada and California sides and carried passengers, mail and provisions back and forth; that since that time the lake is used for recreational purposes and that there are still sight seeing boats that carry passengers all around the lake for hire.

It is further apparent that this Court is entitled to take judicial notice of further facts in connection with Lake Tahoe and its geographic surroundings. We shall hereinafter cite authority to that effect.

We believe that the Court is entitled to take judicial notice that the lake is about twenty miles long and ten miles wide and in most parts deep enough for very considerable navigation by boats of large size; that the lake is completely surounded by three national forests, namely: Tahoe National Forest, El Dorado

National Forest and Toyabee National Forest; that the lake lies on the boundary line between California and Nevada, with large sections of the lake in each state; that the upper Truckee River is a small mountain stream which is the only river that flows into the lake; that the lower Truckee flows out of the lake and thence through Nevada, terminating at Lake Pyramid, which itself has no outlet; that neither of these rivers could possibly support any navigation but that the lower Truckee River is susceptible to use as a source of electric power; that there is no commercial fishing for profit in the lake; that the lake is situated at an elevation of about 6,000 feet; that paved State and United States highways enclose the entire lake area and that these highways connect with the main State highways; that the Southern Pacific railroad lines pass through the nearby city of Truckee.

THE LAW.

STATUTES AFFECTING THE JURISDICTION OF THIS COURT.

We believe that the only statutes which can possibly affect the question here involved are as follows:

1. Article I, Section 8, Clause 3, United States Constitution: "Congress shall have power to regulate commerce among the several states."

2. Article III, Section 2, Clause 1, United States Constitution: "The jurisdictional power shall extend * * * to all cases of admiralty and martime jurisdiction."

3. Section 267, of the Harbors and Navigation Code of the State of California:

"Operation of power boat at more than five nautical miles per hour in certain areas prohibited: Application of section. Every owner, operator, or person in command of any power boat, is guilty of a misdemeanor who operates it or permits it to be operated at a speed in excess of five nautical miles per hour in any of the following areas:

"(a) Within 100 feet of any person who is engaged in the act of bathing.

"(b) Within 200 feet of any:

(1) Beach frequented by bathers.

(2) Swimming float, diving platform, or life line.

(3) Way or landing float to which boats are made fast or which is used for the embarkation or discharge of passengers.

"The provisions of this section shall apply to all waters which are in fact navigable regardless of whether they are declared navigable by this code. (Added by Stats. 1949, ch. 566, Sec. 2.)"

It is apparent that the jurisdiction of the District Court must spring from either one or both of the above constitutional provisions. Section 526m of Title 46 under which this action was prosecuted is contained as a part of the whole body of laws enacted by the Congress to regulate admiralty and maritime affairs. It is our belief that when Congress enacted such law it did so without any belief that the power to pass such law flowed from the commerce provision of the Consti-

tution. Accordingly, if that premise is correct the real question here involved is whether or not the waters of Lake Tahoe may lawfully be made a part of the whole maritime jurisdiction which has been set aside to the Federal Government.

We have studied many decisions concerning the power of Federal Courts to take jurisdiction over different bodies of water bordering and lying in this country but have been unable to find any case in which the Courts have seen fit to apply maritime statutes to any inland body of water *not connected to the sea.*

On the other hand a number of decisions have established certain inland bodies of water not connected with the sea to be subject to Federal control as navigable bodies of water useful in interstate commerce.

During the early years of this nation maritime law was applied only to coastal waters and those inland waters actually affected by the tide. However, as the great navigable rivers began to increase in importance as arteries of commerce, the Supreme Court of the United States ruled that the Federal Government had power over such waters not only as a part of maritime jurisdiction but also through the power of the Courts to regulate interstate commerce. From the time of this decision up to the present the law has been made by judicial opinion rather than any further statutory enactment and we forthwith proceed to a discussion of those decisions.

THE LAW OF MARITIME JURISDICTION.

The landmark decision of the Supreme Court in the case of *The Propeller Genesee Chief et al v. Fitzhugh et al.,* 13 Law. Ed., 1058 also cited as 12 Howard 441, fully discussed the meaning of the Act of Congress extending the jurisdiction of District Courts to certain cases on the Lakes and navigable waters connecting such lakes. The decision was concerned with a collision between two vessels on Lake Ontario and the question, of course, was as to the jurisdiction of Federal Courts under the maritime laws. In deciding that this was indeed a proper subject of maritime law, the Court made the following statement:

> "Again. The Union is formed upon the basis of equal right among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tidewater rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western states. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this Court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the

great objects of the framers of the Constitution; that is, a perfect equality in the rights and the privileges of the citizens of the different states; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the States bordering on the Atlantic.

"The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide.

"Now, there is certainly nothing in the ebb and flow of the Tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

It will be seen that the fundamental reason for empowering the national Courts to regulate maritime matters lies in the necessity for uniform administration of such matters for the obvious reason that ships

moving in commerce up and down our coast or from one state to another would be unreasonably burdened by a variety of State legislation requiring many dissimilar standards. Note that the Court emphasizes the importance of this factor in the event of war or other national emergency. We think this Court should further note that these reasons entirely lose their cogency when one attempts to apply them to waters totally unconnected, however remotely, to the sea. Although we, of course, can conceive that certain boats of small size can actually be moved from an inland body of water to a body of water connected with the sea.

In the case of *Jackson v. The Steam Boat Magnolia,* 15 Law. Ed. 909, 61 U.S. 343, the Court again considered the question of jurisdiction of District Courts in the event of collisions on public navigable rivers above the tidal flow and reached the same conclusion. The Court stated:

> "In conclusion, we repeat what we then said, that 'courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce and a speedy decision of controversies where delay would be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which this Union was formed, to confine these rights to the States bordering on the Atlantic, and to the tide water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable

streams of the Western States. Certainly such was not the intent of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution; that is, perfect equality in the rights and privileges of the citizens of the different States, not only the mode of administering them.'

"The decree of the court below, dismissing the libel for want of jurisdiction, is therefore reversed; and it is ordered that the record be remitted, with directions to further proceed in the case as to law and justice may appertain."

Again the reasoning of the Court for applying maritime law to important inland waters seems to rest upon the importance of uniform application of such laws among all the States. Again we fail to see how this reasoning can be applied to any inland body of water not accessible to or from the sea.

In the case of *The Steamer Daniel Ball v. United States,* 10 Wall. 557, 19 Law. Ed. 999, the Court considered the question of the power of Congress to regulate by way of licensing the movements of any vessel upon the bays, lakes, rivers or other navigable waters of the United States. We call the Court's attention to the following language contained in this decision:

"A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in

law which are navigable in fact. And they are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

* * * * * * *

"We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the federal juris-

> diction would be entirely ousted, and the constitutional provision would become a dead letter."

It would seem from this language that the mere fact that an inland body of water may happen to lie upon the borders between two states is of no importance unless it is actually a highway of commerce or unless it can be held to be a part of maritime jurisdiction, through connection with the sea.

It seems likewise apparent from the ruling of the Court in the *Daniel Ball* case, supra, that there is a clear distinction between the meaning of the term "Navigability" for the purpose of determining State rights to the beds of such waters and the term "navigability" when applied to the question of jurisdiction of the federal government.

In the case of *Perry v. Haines,* 48 Law. Ed. 73, 191 U.S. 17, the Court considered a case in which the plaintiff sought to enforce a lien for repairs of a vessel which was being used in navigating the Erie Canal. The Court held that the federal government had jurisdiction for the reason that the canal itself connected waters which gave access to communication between ports and places in different states and territories. Note the language of the Court at page 78 where it is said:

> "It is not intended here to intimate that, if the waters, though navigable and wholly territorial and used only for local traffic, such, for instance, as the interior lakes of the State of New York, they are to be considered as navigable waters of the United States."

The case of *London Guarantee Co. v. Industrial Accident Commission,* 279 U.S. 109, 73 Law. Ed. 632, was an appeal from the Supreme Court of the State of California involving the application of the Workmen's Compensation Act of the State to maritime injuries in the coastal waters. The facts were concerned with the drowning of the decedent in Santa Monica Bay while employed by a pleasure fishing company. This decision fully discusses the development of maritime law and makes it clear that in such a tort action the locality of the accident is controlling and that the compensation law of the State is inapplicable. The decision emphasizes the importance of applying characteristic rules and regulations to all maritime accidents in order to promote harmony in the equal application of such laws to all persons employed in maritime work.

Again the Supreme Court emphasizes the fact that the accident took place on a body of water connected to the sea. Note, further, that the particular vessel involved was not engaged in interstate commerce and that the Court took jurisdiction solely under Article III, Section 2 of the Constitution rather than the Commerce clause. In this connection the Court stated:

> "Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce as conferred in the Constitution. They are entirely distinct things having no necessary connection with one another, and are conferred in the Constitution by the separate and distinct grants."

Again the question of distinction between power of the federal government under the commerce clause and under the maritime clause is made clear in the case of *The Lucky Lindy* decided by the 5th Circuit Court of Appeals, 76 Fed. (2d) 561. This decision was concerned with a vessel navigating in the Harvey Canal and the question whether or not the Collector of Customs had a right of seizure. During the course of the decision holding that the seizure was proper the Court stated:

> "Appellants, to support their view that the Franicovich Canal is not a navigable water, to which the admiralty and maritime jurisdiction extends, rely on Gulf & I. R. Co. v. Davis (D.C.), 26 F. (2d) 930; Id. (C. C. A.) 31 F. (2d) 109; United States v. Doughton (C.C.A.), 62 F. (2d) 936; Leovy v. United States, 177 U. S. 621; 20 S. Ct. 797, 44 L. Ed. 914; United States v. President, etc., of Jamaica (C.C.A.), 204 F. 759. These cases are concerned not with admiralty and maritime jurisdiction, but with the power of Congress over public waters susceptible of being used as highways for interstate or foreign commerce. The argument that they measure the limits of admiralty jurisdiction 'is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one state to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in article 3, Sec. 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.'

> "Mr. Justice Clifford, in The Belfast, 7 Wall. 624, 640, 19 L. Ed. 266, said: 'Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution, by separate and distinct grants."

The authorities seem to uniformly hold that as to regulation of crimes and torts the question of State or Federal control is determined entirely by the locality of the crime or tort. We believe the decision which discusses this question most fully is the decision of the Supreme Court in the case of *Southern Pacific v. Jensen,* 244 U.S. 206, 61 L.Ed. 1086. This was an appeal from the Court of Appeals of the State of New York and was concerned with the question of the application of the New York Compensation Act to an injury to a longshoreman working on a steamship going between ports of different states, but injured while it was lying at a pier in the North River. The Court held that the state law did not apply and that the maritime laws covered such an accident. The Court stated:

> "The civil jurisdiction in admiralty in cases ex-contractu is dependent upon the subject matter; in cases ex delicto it is dependent upon locality. In cases of the latter class, if the cause of action arises upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged

in commerce at all, or not upon any vessel, the maritime courts have jurisdiction."

And note the language of the Court as follows:

"In the very realm of navigation, the authority of the states to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. * * *

"In each of these cases except the last, which related to intrastate transport the state regulation had an incidental effect upon the very conduct of navigation in interstate or foreign commerce."

In the case of *Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52, 58 L.Ed. 1208, the Court considered a case involving injury to a stevedore which occurred on board ship while lying in the port of Baltimore. The Court held that maritime law applied. The decision discusses the scope of admiralty jurisdiction at some length and we call this Court's attention to the following language:

"We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of 'obvious principle or of very accurate history.' The Blackheath (United States v. Evans) 195 U.S. 361, 365, 367, 49 L.Ed. 236-238, 25 Sup. Ct. Rep. 46. And we are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in

> the present case the wrong which was subject of the suit was, we think, of a maritime nature, and hence the district court, from any point of view, had jurisdiction. The petitioner contends that a maritime tort is one arising out of an injury to a ship, caused by the negligence of a ship or a person, or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow."

It is apparent that admiralty and maritime jurisdiction has been extended to include navigable bodies of water separated by great distances from the sea; but again we wish to point out that there is apparently no case of controlling authority in which the maritime jurisdiction has been extended to waters totally unconnected with the sea either artificially or naturally. An early decision of the District Court of New York, *In re Long Island Transportation Company,* 5 Fed. 599, contains a rather complete summary of all the Federal decisions up to that time which relate to the extent of Federal Jurisdiction over navigable waters. The particular facts in that case were concerned with the application of the Act limiting liability of ship owners operating vessels on the East River in New York State. The Court defines maritime torts as follows:

> "Maritime torts, on the other hand, are all injuries, trespasses and unlawful or injurious acts

done and committed on the sea or navigable waters *connected with the ocean.* Their character as maritime depends exclusively on the place where they are committed. While there are serious questions as to what waters are properly to be included under the term 'navigable waters', or waters connected with the sea, there is no question that the waters over which this vessel ran are subject to the admiralty jurisdiction, and that all torts there committed are maritime torts."

This is the only decision which we have read which states in so many words that admiralty jurisdiction is confined to waters connected in one way or another with the sea. We do not, of course, assert that this old decision by a District Court is conclusive authority for determination of this perplexing problem.

In *Escanaba Co. v. Chicago,* 107 U.S. 691, 27 L.Ed. 442, the question of the power of the State of Illinois to construct bridges over navigable waters came before the Supreme Court. This decision is authority for the proposition that even though waters are clearly navigable the rights of the states to exercise authority of all kinds upon such waters remains paramount until specific Act of Congress clearly supercedes the State authority in any given activity. The Court spoke as follows:

"The power vested in the General Government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters

they form a continuous channel for commerce among the States or with foreign countries. *The Daniel Ball,* 10 Wall. 557 (77 U.S. XIX, 999). Such is the case with the Chicago River and its branches. The common law test of the nevigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are no waters navigable in fact, or to any great extent, which are not also affected by the tide. That test has long since been discarded in this country. Vessels larger than any which existed in England, when that test was established, now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to the bed of the stream, as in some States it governs in that matter.

"The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve and improve their free navigation.

"But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. * * *

"The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exercised are national in their character, and admit and require

uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is, therefore, a declaration that they shall remain free from all regulation. *Welton v. Mo.,* 91 U.S. 275 (XXIII, 347); *Henderson v. Mayor of N. Y.,* 92 Id. 259 (XXIII, 543); *Mobile Co. v. Kimball,* 102 Id. 691 (XXVI, 238).

"On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. As said in *County of Mobile v. Kimball:* 'The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress for when that acts, the state authority is superceded. Inaction of Congress upon these subjects of a local nature, or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by State authority.' 102 U.S. 699 (XXVI, 240)."

We will not attempt to cite to this Court dictionary or textbook definitions as to what constitutes the meaning of the term commerce, the Supreme Court itself has obviously never been able to fix any exact definition covering every aspect of this complicated question.

In the case of *Hopkins v. U. S.,* 171 U.S. 578, 43 L. Ed. 290, the Court did define commerce in the following language:

> "Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states and the power to regulate it embraces all the instruments by which such commerce may be conducted."

In *U. S. v. The Steamer Montello,* 11 Wall. 416, 20 L. Ed. 191, the Fox River of the State of Wisconsin was considered by the Supreme Court as to its navigability as a highway of interstate commerce. This case is authority for the proposition that the Courts may take judicial notice of the principal geographical features of any important body of water in making such determination. In that connection the Court said:

> "We are supposed to know judicially the principal features of the geography of our country and,

as a part of it, what streams are public navigable waters of the United States."

The Court then went on to point out that even though it had examined many histories and geographies the data was insufficient to supply necessary information to fix navigability. The object of this suit was to enforce collection of penalties alleged to be owing to the United States for failure to comply with certain maritime regulations. We are somewhat puzzled as to the exact meaning of the ruling of the Court in holding that maritime regulations could not be applied on the evidence adduced in addition to those facts which were made evidence by way of judicial notice. It would appear to us that this case is analogous to the case now under consideration in many respects. In *The Montello* the water was obviously susceptible to navigation by large steamers and the Court points out that commerce is carried on over such waters destined for other states from Wisconsin and likewise the water is used for carriage of goods entering the state from other states and foreign countries. Clearly such waters under earlier, as well as later, rulings of the Court constituted navigable waters for the purpose of determining title and likewise the power of Congress to regulate interstate commerce. Just as clearly the decision of the Court holds that maritime regulations cannot be applied on such class of water. The distinction, of course, between *The Montello* and the case of Phil Davis as to the facts involved lies in the fact that Lake Tahoe bisects

the California-Nevada State line. However, we strongly urge that the language of the Court in holding that a maritime regulation may not be applied on waters not having connection with other waters so as to form a continued highway over which commerce may be carried on with other states or foreign countries should be carefully considered by this Court.

We believe that the most important decision of the Supreme Court relating to the quality and extent of commerce necessary to impress a water with navigable character is the case of *Leovy v. U.S.*, 177 U. S. 622, 44 L. Ed. 914.

The facts of this case were concerned with determining whether the waters of a by-pass or stream caused by the overflow of the Mississippi River and forming a channel between the river and the Gulf of Mexico were navigable waters of such character that the United States would have authority to prevent the construction of a dam erected in the by-pass. After reviewing the earlier authorities on this subject the Supreme Court stated:

> "It is a safe inference from these and other cases to the same effect which might be cited that the term, 'navigable waters of the United States,' has reference to commerce of a substantial and permanent character to be conducted thereon. The power of Congress granted to regulate such waters is not expressly granted in the Constitution, but it is a power incidental to the express 'power to regulate commerce with foreign nations, and among the several states, and with

the Indian tribes;' and with reference to which the observation was made by Chief Justice Marshall, that 'it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states.' Gibbons v. Ogden, 9 Wheat. 194, 6 L. ed. 69.

"While, therefore, it may not be easy for a court to define the size and character of a stream which would place it within the category of 'navigable waters of the United States,' or to define what traffic shall constitute 'commerce among the states,' so as to make such questions sheer matters of law, yet, in construing the legislation involved in the case before us, we may be permitted to see that it was not the intention of Congress to interfere with or prevent the exercise by the State of Louisiana of its power to reclaim swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as arteries of interstate commerce.

"The trial judge instructed the jury as follows: 'What is a navigable water of the United States? It is a navigable water which, either of itself, or in connection with other water, permits a continuous journey to another state. If a stream is navigable, and from that stream you can make a journey by water, by boat, by one of the principal methods used in ordinary commerce, to another state from the state in which you start on that journey, that is a navigable water of the United States. It is so called in contradistinction

to waters which arise and come to an end within the boundaries of the state. * * * But, if from the water in one state you can travel by water continuously to another state, and the water is a navigable water, then it is a navigable stream of the United States. * * * If it was navigable, and connected with waters that permitted a journey to another state, then it is a navigable water of the United States.' And again: 'But the fact I wish to impress upon you is this, that it is not absolutely necessary that you should find that there was navigability all the way from the Jump out to the gulf, because if, from some point beyond the place where Mr. Robert S. Leovy built this dam, towards the Mississippi river, the stream was navigable, then it would be a navigable stream of the United States, because it would connect with the Mississippi river.'

"If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all of the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

"Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states, and would subject the officers and agents of a state, engaged in constructing levees to restrain overflowing rivers within their

banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.

"We also think that these instructions are open to the further criticism that they contain no reference to the nature or extent of the traffic or trade carried on in Red Pass before the erection of the dam. Indeed, the charge necessarily implies that the defendant was guilty if there was merely a capacity for passing from Red Pass into the Mississippi river on any sort of a boat. Very different was the view expressed by Chief Justice Shaw when he said it is not 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable.' But in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture. (Rowe v. Granite Bridge Corp.) 21 Pick. 344.

> "We have read the testimony offered on behalf of the United States to show the kind and extent of the navigation of the Red Pass, and there is no view we can take of it that warranted the jury in finding that interstate commerce was ever transacted there."

The 1930 decision of the Supreme Court in the case of *U. S. v. Utah,* 75 L. ed. 844, 283 U. S. 64, would seem to be a decision that is important in resolving the present question. This case was largely concerned with the question of title to the beds of certain rivers running through the state of Utah and into Arizona, including the Colorado River. The Court incidentally discussed the question of navigability of such rivers for the purpose of Federal regulation and control. Much historical and geographical evidence was submitted by way of the findings of a master. The Court had occasion to discuss the important question of the prospective use of the Colorado River for substantial commerce in the future as related to the characteristics of the adjacent town and settlements along the river. In this connection the Court stated:

> "The question of that susceptibility in the ordinary condition of the rivers, rather than the mere manner or extent of actual use, is the crucial question. The government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual

use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. As the court said, in Packer v. Bird, 137 U. S. 661, 667, 34 L. ed. 819, 820, 11 S. Ct. 210: 'It is, indeed, the susceptibility, to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or soils under them.' In Economy Light & P. Co. v. United States, 256 U. S. 113, 122, 123, 65 L. ed. 847, 854, 855, 41 S. Ct. 409, the court quoted with approval the statement in The Montello (United States v. The Montello) 20 Wall. 430, 22 L. ed. 391, supra, that 'the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.'

"It is true that the region through which the rivers flow is sparsely settled, the towns of Green River and Moab are small, and otherwise the country in the vicinity of the streams has but few inhabitants. In view of past conditions, the government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a state of the Union, is not to be denied title to the beds of such

> of its rivers as were navigable in fact at the time of the admission of the state either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put."

In the case of *U. S. v. Doughton,* 62 Fed. (2d) 936, the question concerned the right of the Federal Government to prevent the construction of a bridge over a river. The decision contains a considerable discussion of the question of navigability and a review of the authorities relating to such question. The decision stated in part:

> "On the other hand, it is not sufficient to bring a stream under the regulatory power of Congress that it merely be susceptible of some sort of navigation. If this were true, there is scarcely a creek or stream in the United States that would not be a navigable water of the United States or that could be bridged by the state highways or the railroads without the approval of the Secretary of War. Congress would thus be enabled under the commerce clause to exercise control over in-

ternal affairs of the states in relation to streams where interstate commerce has no existence, actual or potential; and the states would be deprived of vital power in regulating matters of domestic concern, having no relation to commerce. This would clearly contravene the whole theory of the Constitution as to the division of the powers of sovereignty between state and national governments. We think that the true rule is that, to come within the regulatory power of Congress, the stream must be susceptible in its natural condition of becoming a highway of interstate or foreign commerce; i.e., it must be of such a nature and so situated that there is at least a practical possibility of its being used as a highway for such commerce; for, as has been said, the power of Congress over navigable waters of the United States, arising as it does under the commerce clause of the Constitution, 'has reference to commerce of a substantial and permanent character to be conducted thereon.' "

An interesting decision of the District Court for the Northern Division of Idaho is reported in the case of *U. S. v. Ladley,* 42 Fed. (2d) 474. This decision was concerned with the question of the navigability of an inland lake and issues arose as to not only the question of extent of water for use by ships and boats but also as to the character of the surrounding country in determining whether useful commerce would ever be carried on over such waters. The evidence showed that pleasure boating, fishing and movement of logs were about the extent of com-

mercial use of the lake. In this connection the Court stated:

> "The test of navigability in fact of a stream or lake is whether in its natural condition it is used or susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Oklahoma v. Texas, 258 U. S. 574, 42 S. Ct. 406, 66 L. Ed. 771. To meet that test a water course should be susceptible of use for such purposes. It should be of practicable usefulness to the public as a public highway in its natural state, and without the aid of artificial means. It must have had a useful capacity long enough to be used as a highway of transportation, and such purposes, use and navigability must be established by clear evidence."

In the case of *Harrison v. Fite,* a decision by the 8th Circuit contained in 148 Fed. 781, there is a long discussion of the question of navigability. The suit involved an attempt by officers of a shooting club to secure an injunction against market hunters from trespassing on the waters of Big Lake lying in the northeast corner of the state of Arkansas and extending to the Missouri line. The legal issue involved was whether or not the waters were of a private nature so that the shooting club could prevent trespass or were of a public navigable nature open to use by anyone. The Court reviewed the history of commercial use of Big Lake and the adjoining Little River and found that although the waters had been used

to some extent in early days that the waters no longer were of such quality as to be useful aids to interstate commerce. In this connection the Court stated:

> "Whatever may have once been the capacity and utility of the body of water known as Big Lake as a highway of commerce or in the floatage of products of the fields and forests along its banks, the conditions that are to be considered are those of recent years and the present. The evidence showed that there had been no successful navigation of this water in recent years, with the exception of canoes, skiffs and dugouts of the hunters and fishermen; that it is not being used to float the products of the field and forest to market and cannot be profitably and successfully used for that purpose. If practical adaptability and usefulness are the tests, the finding of the lower court was right."

Apparently from this decision the 8th Circuit very clearly has held that even though a body of water may extend along a state line and have some capacity for carriage of boats that it is not necessarily public navigable waters unless there is a showing of present or probable use of such waters in substantial and profitable commercial commerce.

In the case of *Toledo Liberal Shooting Co. v. Erie Shooting Club,* the 6th Circuit Court considered the question of navigability of a 4,000-acre bay or arm of one of the Great Lakes. It was conceded that the water was of sufficient depth to support navigation at the point where it connected with the lake but the remainder of the waters were of a very shallow

character. Accordingly, the Court held that such waters were subject to private ownership. The Court finds that the pursuit of water fowl in small boats and pleasure fishing are not commerce within the meaning of the Constitutional term. The Court further pointed out that it has been the rule in this country that in order to impress waters with the character of navigability that they must be useful for the purposes of trade or agriculture.

The only decision of a Federal Court relating to a violation of the same statute (Sec. 526m, 46 U.S.C.A.) as is concerned in this case appears to be the case of *U. S. v. Ross,* 74 Federal Supplement 6. The defendant was charged with operating a motor boat in a reckless and negligent manner and accordingly endangering the lives of other persons. The charge was dismissed by the District Court for the reason that the waters over which the boat was being operated were held to be not of a navigable character. The decision does not discuss the question of application of maritime law in the case but based it simply upon two reasons, namely, that the waters involved were not well adapted to the movement of large boats and that the water itself did not serve any useful purpose for the conduct of commercial trade and agriculture. The water concerned was a borrow pit separated from the Mississippi River by a levee with various connections between the river and the pit over which small boats can be operated. The defendant was a commercial boat operator engaged in carrying duck hunters on the waters for hire. The facts of this case, of

course, are different in that while there appears to have been a direct connection with waters leading to the sea the entire lake or pit lay within the boundaries of one state. The decision sheds some light on the requirement that the waters in question be of a useful nature in furthering interstate commerce.

We believe that we should call the Court's attention to the fact that the statute under which defendant is here charged with crime is a part of a large number of statutes regulating the use of motor boats. Nowhere in Title 46 does there appear to be any definition of the waters to which the regulations shall apply. The section itself is contained in subchapter 2, relating to registry and recording, the subchapter being titled simply The Motor Boat Act of 1940. This act was a general amendment to all of the statutes previously passed relating to regulation of motor boats, the new act being made effective in 1940. An examination of the old chapter 16 of Title 46 entitled "Regulation of Motor Boats" and enacted in 1910 likewise seems to contain no definition of the waters to which the regulations should be applied. The Court should note that the enforcement of the administration of these regulations was transferred from the Bureau of Marine Inspection and Navigation of the Department of Commerce to the United States Coast Guard by act of Congress effective in July, 1946.

We have not deemed it advisable to review any further authorities relating to the power of Congress to regulate navigable waters under the commerce clause of the Constitution. We know that this Court

is well familiar with the numerous decisions extending this power to enforcement of the Fair Trade Act as applied to industries shipping goods in interstate commerce and many other kinds of Federal regulation. In all this class of cases the question of eventual movement of the goods into commerce is conceded. The difficult questions arise where an industry is only indirectly concerned with the movement of such goods in such commerce.

ARGUMENT.

It appears from the foregoing decisions that the Federal Courts of this land have never before had occasion to consider the right of the Federal Government to enforce the terms of a criminal statute relating to movement of boats on purely inland waters. We are not aware of any instance since the establishment of Federal Courts in California where such Courts have ever been concerned with regulating the waters of Lake Tahoe, for whatever purpose.

We do not concede that the mere assumption of authority on these waters by the Coast Guard or any other Federal agency would necessarily be of any importance in determining whether the Federal Court has jurisdiction to enforce criminal statutes such as the one under consideration. On the other hand, we do believe that it is significant that at the trial of this cause the Government adduced no evidence indicating that the United States Coast Guard was presently or in the past had been concerned with navigation upon

the Lake. We take it that, if the waters of the Lake are deemed to be within maritime jurisdiction, that it is the duty and obligation of the Government to take reasonable steps toward the enforcement of all laws which it claims apply to such waters.

We feel that this Court should carefully analyze the practical facts relating to all the geographical and commercial aspects of Lake Tahoe. We emphasize that it is here sought to enforce a Federal penal statute on a mountain lake totally divorced and separated from any connection with other navigable waters. That it is a lake lying at over 6,000 feet elevation and entirely surrounded by national forests. We take it that by the establishment of such forests for an indefinite period of time in the future that the government has, practically speaking, withdrawn all of the surrounding area from use by the states as areas of commercial growth and usefulness. We believe that these facts entirely negative any theory that the Lake may in the foreseeable future become a body of water substantially in aid of interstate commerce.

We believe that the Court should look at the problem realistically and not find navigability simply by invoking the doctrine of *de minimis*.

We can, of course, conceive that a regular business could be maintained in transporting various supplies across the Lake from one resort to another, accomplishing, incidently, a passage over state lines. It is likewise easy enough to speculate that the laws of Nevada and California policing and regulating the use of motor boats upon the lake may not now nor in the

And secondly, we contend with equal emphasis that the waters of this Lake are so far from being within the contemplation of maritime affairs and so isolated from the sea that jurisdiction cannot be made a part of federal government control over true maritime shipping. We respectfully urge this Court for an order reversing the judgment of conviction.

Dated, Oakland, California,
March 22, 1950.

Respectfully submitted,
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